

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE COMMISSIONER OF LABOR AND INDUSTRY

In the Matter of Todd Scott Wheeler,
individually and d/b/a Timber Mountain
Construction, a/k/a Construction Associates

**FINDINGS OF FACT,
CONCLUSIONS
AND RECOMMENDATION**

The above-entitled matter came on before Administrative Law Judge Kathleen D. Sheehy for hearing on August 29, 2006, at the Office of Administrative Hearings, Suite 1700, 100 Washington Avenue South, Minneapolis, Minnesota 55401. The OAH record closed on September 26, 2006, upon receipt of the last post-hearing brief.

Christopher M. Kaisershot, Assistant Attorney General, Suite 1200, 445 Minnesota Street, St. Paul, MN 55101-2130, appeared for the Department of Labor and Industry (Department).

Thomas C. Pearson, Esq., Erickson, Pearson & Aanes Law Offices, 319 South Sixth Street, PO Box 525, Brainerd, MN 56401, appeared for Todd Scott Wheeler (Respondent).

STATEMENT OF ISSUES

1. Did the Respondent engage in unlicensed residential building contractor work by building a new home, in violation of Minn. Stat. §§ 326.84, subds. 1 and 1b, and 326.91, subd. 1(5) and 4?¹

2. Did the Respondent perform in breach of contract by failing to complete work on the home, in violation of Minn. Stat. § 326.91, subds. 1(4) and 4?

3. Did Respondent engage in an act that demonstrates he is untrustworthy, financially irresponsible, or incompetent by using \$3,900 of the landscaping budget for purposes other than landscaping, in violation of Minn. Stat. § 326.91, subds. 1(6) and 4, and Minn. R. 2891.0050, subp. 1C?

¹ Unless otherwise specified all references to Minnesota Statutes are to the 2004 edition.

4. Did Respondent fail to pay a plumbing subcontractor who worked on the project, demonstrating that he is untrustworthy, financially irresponsible, or incompetent, in violation of Minn. Stat. § 326.91, subds. 1(6), (8), and 4?

5. Did Respondent misrepresent his unlicensed status in executing a contract that requires the contractor to secure all licenses necessary for the proper execution and completion of the work, thereby engaging in fraudulent, deceptive, or dishonest practices in violation of Minn. Stat. § 326.91, subds. 1(2) and 4, and Minn. R. 2891.0040, subp. 1D?

Based upon all of the files, records and proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. The Respondent, Todd Scott Wheeler, has engaged in the business of home building under the names Timber Mountain Construction and Construction Associates. The Department has not licensed any of these entities as a residential building contractor.

2. Respondent built his home at 31902 Castlewood Court, Breezy Point, Minnesota. The home is located in the Castlewood Estates development. At all relevant times, Respondent was the developer of Castlewood Estates. In the summer of 2003, Respondent's own home was listed for sale through a local realty company.

3. In the summer of 2003, Michael and Bambi O'Hern were living in Orange, California. They were, however, planning to move to Breezy Point, Minnesota, and they were working with a realtor who showed them the Respondent's home. The O'Herns made an offer to purchase the home, but for various reasons related to the timing of their move and the terms of a possible rent-back to Respondent, Respondent did not accept the offer. Respondent indicated to them that if they liked his home, they could buy property in the development and use the plans for his home to build a new one.²

4. The O'Herns purchased two lots in the development from Respondent. They intended to return to California and live there until the home in Breezy Point was completed. In discussions with Respondent about building on those lots, Respondent told the O'Herns that he was not a licensed contractor in Minnesota, but that if they agreed to be the general contractor and to pull the building permit themselves, they could hire him to build the home.³ With some modifications and enlargements of the existing plans, Respondent estimated that he could build the 6,000-square foot home to the O'Herns' specifications for

² Testimony of Todd Wheeler.

³ Test. of T. Wheeler; Testimony of David Elsenpeter.

\$425,523. As in inducement to use him as the contractor, Respondent offered to give the O'Herns a \$15,000 credit on the cost of building the home.⁴

5. On January 19, 2004, the O'Herns signed an agreement with Respondent calling for the construction of a new residence on Lots 7 and 8 of Castlewood Estates. The contract identifies the O'Herns as the owners and the Respondent individually as the contractor.⁵ The contract sum is stated to be \$410,523, which reflects the \$15,000 credit offered by Respondent.⁶ The contract provides that the contract sum may be changed only by written change order.⁷

6. The contract further provides that work was to begin on or about March 25, 2004, and was to be substantially complete by April 30, 2005. The contract also provides that due to normal variations in the custom construction process including, but not limited to the selection, ordering, manufacture, and installation of customer selections, the substantial completion date may be forty-five days earlier or later than projected in the contract.⁸ Substantial completion was defined as the date when "construction is sufficiently complete so that the owner can occupy or utilize the work for the use for which it is intended."⁹

7. On January 19, 2004, Bambi O'Hern signed an application for a building permit from the City of Breezy Point. In the application, Ms. O'Hern identified herself as the building contractor.¹⁰

8. On February 16, 2004, Bambi and Michael O'Hern signed an acknowledgment on a form submitted to the City of Breezy Point, which provides as follows:

I understand that the State of Minnesota requires that all residential building contractors, remodelers and roofers obtain a state license unless they qualify for a specific exemption from the licensing requirements. *By signing this document, I attest to the fact that I am building or improving this house myself.* I hereby claim to be exempt from the state licensing requirements because I am not in the business of building on speculation or for resale, and that the house for which I am applying for this permit, located at Castlewood

⁴ Ex. C; Test. of T. Wheeler; Testimony of Bambi O'Hern; Testimony of Michael O'Hern.

⁵ The top of the first page of the contract contains the name and address of Timber Mountain Construction, but the contract does not anywhere identify Timber Mountain Construction as the contractor. Instead, the signature page identifies Todd Scott Wheeler as the contractor.

⁶ Ex. B.

⁷ *Id.*, Art. 17(b).

⁸ *Id.*, Art. 2(a).

⁹ *Id.*, Art. 13(a).

¹⁰ Ex. 1.

Estates Lots 7 & 8, is the first residential structure I have built or improved in the past twenty-four (24) months. I also acknowledge that because I do not have a state license, I forfeit any mechanic's lien rights to which I may otherwise have been entitled under Minn. Statute 514.01.

Furthermore, I understand that I may be hiring independent contractors to perform certain aspects of the construction or improvement of this house and I understand that some of these contractors may be required to be licensed by the State of Minnesota. *I understand that unlicensed residential contracting, remodeling, and/or roofing activity is a misdemeanor under Minnesota law, and that I would forfeit my rights to reimbursement from the Contractor's Recovery Fund in the event that any contractors I hire are unlicensed.*¹¹

9. At the bottom of this page, underneath the O'Herns' signatures, the form further provides that "To determine whether a particular contractor is required to be licensed, or to check on the licensing status of individual contractors, please call the Minnesota Department of Commerce, Enforcement Division, at (612) 296-2594, or toll free at 1-800-657-3602."¹²

10. The City of Breezy Point issued the building permit for the project to the O'Herns on February 23, 2004.¹³

11. The O'Herns financed the construction of the home with funds from the sale of their home in California, some of which were deposited in a construction escrow account in the Lakes State Bank in Pequot Lakes, Minnesota, and with funds from a construction loan, which initially was issued in the amount of \$200,000. Upon receipt of monthly draw requests from the Respondent, and after either verbal or written approval of the draw requests by the O'Herns, the Lakes State Bank issued checks to the Respondent and to the various subcontractors identified by the Respondent for work done on the home. The bank sent all payments intended for subcontractors directly to the subcontractors.¹⁴

12. In June 2004, Respondent notified the O'Herns that his business name had changed to Construction Associates.¹⁵

¹¹ Ex. 2 (emphasis added).

¹² *Id.*

¹³ Ex. 5.

¹⁴ Test. of D. Elsenpeter.

¹⁵ Ex. D, Draw Request No. 3; Ex. F.

13. In September 2004 the O'Herns signed a written change order adding some windows, a window well, some additional work on the well, and a gas line for a total of \$5,040.¹⁶

14. By December 2004 it had become apparent that the Respondent's estimate for construction materials (\$83,500) was grossly underbid. The bid did not include the materials for the floor system, roof trusses, drywall, or finishing material for the large master suite over the garage. Respondent blamed the error on the lumberyard (BuildAll Lumber). Respondent estimated at that time that the materials costs were about \$30,000 more than the estimate.

15. By December 2004, it had also become apparent that the O'Herns needed to borrow more money than they had anticipated, because they had used some of the funds from the sale of their California home for other purposes.¹⁷ By this time the O'Herns had paid \$313,532 in construction costs and had exhausted the initial construction loan.¹⁸

16. In a meeting with the O'Herns and their banker, Respondent estimated that it would cost an additional \$150,000 to finish the project, which would bring the total price to approximately \$463,532. The O'Herns did not believe they should be responsible for the overage amounts, but they agreed to borrow another \$150,000 because they felt they had no other option but to complete the project.¹⁹

17. In December 2004, Michael O'Hern moved to Minnesota in advance of his family and began looking for work. He had construction experience in the installation of commercial heating, ventilating, and air conditioning (HVAC) systems. When he was unable to immediately find the type of work he was seeking, the Respondent hired him to work as a construction worker on the O'Herns' home. O'Hern worked for the Respondent through the beginning of April 2005.²⁰

18. In March 2005, Michael O'Hern was planning a trip back to California for family reasons and needed some funds. He asked the Respondent to include in the next draw request the sum of \$2,000 from the landscaping budget, which O'Hern intended to use for the trip back to California. Respondent did as O'Hern requested and gave him the \$2,000.²¹ Respondent also gave

¹⁶ Ex. D, Draw Request No. 6.

¹⁷ Test. of D. Elsenpeter; Test. of T. Wheeler; Test. of O'Herns.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Test. of M. O'Hern.

²¹ Test. of M. O'Hern; Test. of T. Wheeler; Ex.D, Draw Request No. 12.

O'Hern a spreadsheet with an estimate that it would cost somewhere between \$37,000 and \$47,000 more to finish the home.²²

19. As of the end of March 2005, the O'Herns had paid \$451,639.00 in construction costs.²³ There was still a substantial amount of finishing work to be completed on the home, including installation of plumbing fixtures, carpet, and deck; trim work throughout the home; and electrical work.²⁴

20. When the O'Herns jointly reviewed the amounts already expended, they called the Lakes State Bank and informed their banker that they would not permit payment of any further expenses from the construction loan account to the Respondent until the overages were reconciled.²⁵ They subsequently spoke to the Respondent, who said he would not "work for free" or arrange for any further work by subcontractors unless they allowed the bank to disburse amounts owed.²⁶

21. On April 12, 2005, the O'Herns wrote the following letter to Respondent:

Your failure to complete construction is being viewed by us a [breach] of contract as [cited] in Article 9B of the Construction Contract between Bambi and Michael O'Hern and Timber Mountain Construction/Construction Associates. As per your request you will no longer be permitted on the property of 31876 Castlewood Ct., [C]ity of Breezy Point, lots 7 & 8, or within the housing structure within the private property. Nor are you employed by us to complete any remaining work on the house as of April 12, 2005.²⁷

22. After this date, the O'Herns managed the building process. They spent approximately \$30,202 from the construction loan account toward completion of the project.²⁸ They also paid \$13,134.12 to remove a lien filed by

²² Ex. H.

²³ Test. of M. O'Hern; Ex. M. There continued to be substantial overages due to materials costs after December 2004. See *generally* Ex. 11 (bank records reflecting total payments to Build All Lumber in the amount of \$129,822). In addition, the O'Herns made an \$18,000 payment for materials in July 2004 that was applied to the materials budget. See Ex. H; Ex. D, Draw Request No. 4. This would mean that the total amount spent for materials was about \$147,822, or about \$64,322 over the budgeted amount).

²⁴ Ex. K.

²⁵ Test. of B. O'Hern.

²⁶ Test. of T. Wheeler.

²⁷ Ex. I.

²⁸ See *generally* Ex. 11 (disbursements from construction loan account between May 24, 2005 and June 7, 2005). This sum includes some funds paid to Michael O'Hern for the value of his labor. See *id.*, draw request paid on May 24, 2005. It may or may not include a variety of smaller expenses identified by the O'Herns for supplies and materials from hardware stores and Home Depot. See Ex. O.

the plumber for work and fixtures that had been provided, but not yet billed, at the time the O'Herns terminated the agreement with Respondent.²⁹

23. In December 2005, the Department received information that Respondent had engaged in unlicensed contractor activity on behalf of the O'Herns.³⁰

24. On April 12, 2006, the Commissioner served on the Respondent by U.S. Mail the Notice and Order for Hearing, Order for Prehearing Conference, and Statement of Charges in the above matter.

25. The prehearing conference took place on May 17, 2006. At that time, the hearing was scheduled to take place on July 12, 2006.³¹ Because of a conflict in the Administrative Law Judge's schedule, the hearing was rescheduled to take place August 15, 2006.³²

26. On July 17, 2006, at the request of the Respondent, the hearing was rescheduled to August 29, 2006.³³

27. On July 26, 2006, the Commissioner served the Respondent by U.S. Mail with a Notice of Amendment, Notice of and Order for Hearing, and Amended Statement of Charges.

28. The hearing took place as scheduled on August 29, 2006.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Administrative Law Judge and the Commissioner are authorized to consider the charges against Respondent under Minn. Stat. §§ 14.50, 326.91, and 326.92, subd. 3.

2. The Department has complied with all relevant procedural legal requirements.

3. The Commissioner may take disciplinary action against unlicensed residential building contractors.³⁴

²⁹ Ex. 9.

³⁰ Ex. N.

³¹ Prehearing Order (May 17, 2006).

³² Second Prehearing Order (June 22, 2006).

³³ Letter from Respondent's counsel to the Administrative Law Judge (July 17, 2006).

4. The Respondent is not licensed, but he engaged in residential building contractor activity, in violation of Minn. Stat. § 326.84, subd. 1.

5. The Commissioner may take action against residential building contractors who perform in breach of contract.³⁵

6. The O'Herns terminated the contract before the Respondent was obligated to substantially complete construction of the home. The Respondent did not perform in breach of contract by failing to complete work on the home.

7. The Commissioner may take action against a residential building contractor who has been shown to be incompetent, untrustworthy, or financially irresponsible. Diversion of funds from the purposes for which the funds were intended is a practice considered to be incompetent, untrustworthy, or financially irresponsible.³⁶

8. The Respondent did not divert funds intended to be used for landscaping.

9. The Commissioner may take action against a residential building contractor who has been shown to be incompetent, untrustworthy, or financially irresponsible or who fails to use the proceeds of any payment to the contractor for payment of labor, skill, material, or machinery contributed to the construction or improvement of residential real estate, knowing that the cost of the labor, skill, material or machinery furnished for the improvement remains unpaid.³⁷

10. The O'Herns did not make any payment to Respondent specifically intended to cover the balance of the plumbing bill, and the Respondent did not fail to pay a plumbing contractor with the proceeds of any payment intended to cover the plumbing work in violation of Minn. Stat. § 326.91, subd. 1(8).

11. The Respondent had collected substantial additional sums from the O'Herns in the form of materials overages without amending the contract in writing or giving the O'Herns any certainty about what the total costs would be. The Respondent should have paid the balance of the plumbing bill under these circumstances, and his failure to do so does demonstrate that he was incompetent or untrustworthy, warranting discipline under Minn. Stat. § 326.91, subd. 1(6).

12. The Commissioner may take action against a residential building contractor who engages in fraudulent, deceptive, or dishonest practices. Any

³⁴ Minn. Stat. §§ 326.84, subds. 1 and 1b, and 326.91, subd. 1(5) and 4.

³⁵ Minn. Stat. § 326.91, subds. 1(4) and 4.

³⁶ Minn. Stat. § 326.91, subds. 1(6) and 4; Minn. R. 2891.0050, subp. 1C.

³⁷ Minn. Stat. § 326.91, subds. 1(6), (8), and 4.

fraud or dishonesty in the execution of a contract incident to a building transaction is considered a fraudulent, deceptive, or dishonest practice.³⁸

13. The Respondent's contract provides that he will secure and pay for the building permit and "for all other permits and governmental fees, licenses and inspections necessary for the proper execution and completion of the work." A license from the Department is a license necessary for the proper execution and completion of the work. Inclusion of this phrase in the contract of an unlicensed builder is dishonesty in the execution of a building contract and is a deceptive or dishonest practice.

14. Disciplinary action against the Respondent is in the public interest.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RECOMMENDED: that the Commissioner take disciplinary action against the Respondent.

Dated: October 11, 2006.

s/Kathleen D. Sheehy

KATHLEEN D. SHEEHY
Administrative Law Judge

Reported: Tape recorded (4 tapes)
No transcript prepared

MEMORANDUM

Count 1 of the Amended Statement of Charges alleges that the Respondent engaged in unlicensed residential building contractor work. There is no dispute that neither the Respondent nor his businesses were licensed by the Department or that he did in fact engage in unlicensed work. Respondent argues that he did not believe he violated the statute by contracting with the O'Herns. The record reflects, however, that Respondent was aware that residential building contractors are required to be licensed in Minnesota and that he proposed the scheme by which the O'Herns identified themselves as the general

³⁸ Minn. Stat. § 326.91, subds. 1(2) and 4; Minn. R. 2891.0040, subp. 1D.

contractor in an effort to avoid the licensing requirement. The Department has proved a violation of Count 1.

Count 2 alleges that the Respondent failed to complete the work on the O'Herns' home, including failing to install plumbing fixtures, carpeting, deck, trim work, gutters, landscaping, and electrical, and failing to pave the driveway. The Respondent did not fail to complete the work; rather, the O'Herns fired him before he was obligated to finish the work, for good reason, because of their dispute about the price.³⁹

Count 3 alleges that Respondent withdrew \$3,900 allocated for landscaping from the loan but failed to complete any landscaping before his employment was terminated. The record reflects that the Respondent did some landscaping work in the form of grading the property and installing timbers used for a retaining wall, which could be what is reflected on the Respondent's spreadsheet as a \$1,500 draw on the landscaping budget in November 2004.⁴⁰ The other \$2,000 drawn from the loan account was done with the express consent of Michael O'Hern to help fund his trip to California in early April 2005. The Department has failed to prove any violation of Minn. Stat. § 326.91, subd. 1(6), or Minn. R. 2891.0050, subp. 1C, based on this conduct.⁴¹

Count 4 alleges that the Respondent failed to pay \$13,134.12 to Larry Blaeser Plumbing for labor, services, or supplies provided on the project, despite receiving \$449,185.84 in progress payments. The Department alleged that this conduct proves two violations: Minn. Stat. § 326.91, subd. 1(6) and 1(8). Minn. Stat. § 326.91, subd. 1(8), permits the Commissioner to take action against a contractor who fails to use the proceeds of any payment made to the licensee for the construction of, or any improvement to, residential real estate for the payment of labor, skill, material, and machinery contributed to the construction or improvement, knowing that the cost of any labor performed, or skill, material, or machinery furnished for the improvement remains unpaid. The Administrative Law Judge has concluded that the O'Herns did not make any payment to Respondent specifically intended to cover the balance of the plumbing bill, so there is no violation of this section.

Minn. Stat. § 326.91, subd. 1(6), permits the Commissioner to take action against a contractor who has been shown to be incompetent, untrustworthy, or financially irresponsible, and the Administrative Law Judge has concluded that

³⁹ In its brief the Department argues the Respondent performed in breach of contract by overcharging the O'Herns, but this is not the violation alleged in the Amended Statement of Charges.

⁴⁰ Ex. H (\$1,500 charged to landscaping budget in draw request No. 7); Ex. D, Draw Request No. 7, dated November 3, 2004.

⁴¹ In its brief the Department argues that Respondent's "failure to provide any credible accounting of expenses" and his provision of a spreadsheet containing inaccurate information demonstrates a violation as well, but these were not the violations alleged in the Amended Statement of Charges.

the Respondent did violate this section. By charging the O'Herns for all materials overages without negotiating this through the change order process and obtaining their written agreement, as required by the contract, Respondent made it impossible for them to keep track of the total contract price. Respondent's interpretation that they were responsible for all overages essentially means that the contract price is completely uncertain until all the bills are paid, which is not what the contract says. The O'Herns' agreement in December 2004 to pay the overages accumulated to that point does not mean that they were legally responsible for those overages or for any similar overages that might accumulate in the future. By the time their relationship fell apart, the O'Herns had paid substantially more than the express terms of the contract required them to pay, and the Respondent should have paid the plumbing bill instead of requiring them to do so to satisfy a lien. The Respondent's failure to do so, under these circumstances, shows him to be untrustworthy in violation of Minn. Stat. § 326.91, subd. 1(6).

Count 5 alleges that in one provision of the contract requiring the contractor to secure all licenses necessary to properly execute and complete the work, the Respondent misrepresented his unlicensed status and thereby engaged in fraudulent, deceptive, or dishonest practices in violation of Minn. Stat. § 326.91, subd. 1(2), and Minn. R. 2891.0040, subp. 1D. This contractual term does misrepresent the Respondent's ability to become licensed for purposes of building this home, and the Administrative Law Judge has concluded that the Department has proved this violation.

It is important to note, however, that this deception in the contract did not in fact deceive the O'Herns. The Administrative Law Judge has concluded, based largely on the testimony of Dave Elsenpeter (the O'Herns' banker), that the O'Herns knew the Respondent was unlicensed, and they knew it before the contract was signed. Therefore, the O'Herns knowingly engaged an unlicensed builder and participated in making false statements to the City of Breezy Point for the purpose of obtaining the building permit. Their testimony that they did not remember why they did this is unconvincing. The fact that the O'Herns knew the Respondent was unlicensed does not diminish the seriousness of the Respondent's violation, because Respondent never should have proposed the scheme, but it is relevant in assessing the harm caused by the violation and in determining the amount of any civil penalty.

K.D.S.

NOTICE

This Report is a recommendation, not a final decision. The Commissioner of Labor and Industry will make the final decision after reviewing the record and may adopt, reject or modify these Findings of Fact, Conclusions, and Recommendation. Under Minn. Stat. § 14.61, the Commissioner's decision shall

not be made until this Report has been available to the parties to the proceeding for at least ten (10) days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Board. Parties should contact Scott Brener, Commissioner, Department of Labor and Industry, 443 Lafayette Road North, St. Paul, MN 55155, or call the Department at (651) 284-5005, to learn about the procedure for filing exceptions or presenting argument.

Under Minn. Stat. § 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law. If the Commissioner fails to issue a final decision within 90 days of the close of the record, this report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a. In order to comply with this statute, the Commissioner must then return the record to the Administrative Law Judge within 10 working days to allow the Judge to determine the discipline to be imposed. The record closes upon the filing of exceptions to the report and the presentation of argument to the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and the Administrative Law Judge of the date on which the record closes.